85-905

Supreme Court, U.S.
FILED
OCT 9 1985
JOSEPH F. SPANIOL, JR.
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

* * * * *

DONALD E. SALISBURY, Petitioner,

v.

JAMES RIVER CORPORATION,
UNITED PAPER WORKERS INTERNATIONAL,
AFL/CIO and LOCAL 1010 UNITED PAPER-
WORKERS,

* * * * *

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

* * * * *

SLOAN, BENEFIEL, FARRER & NEWTON
James T. Sloan (P20583)
Co-counsel for Petitioner
501 ComericA Bldg.
Kalamazoo, MI 49007
616-381-5830

RANDOLPH McCARTHY, JR., P.C.
Randolph McCarthy, Jr. (P17288)
Co-counsel for Petitioner
201 Park Bldg. 132 W. South Street
Kalamazoo, MI 49007
616-343-8410

EARLY, LENNON, PETERS & CROCKER
James E. Beck (P27614)
Attorneys for Defendant James River
300 ComericA Bldg.
Kalamazoo, MI 49007
616-349-8765

CAREY, DURHAM & RISDON
Thomas D. Carey (P11608)
Co-counsel for Defendant International
and Local 1010
130 N. Park Street
Kalamazoo, MI 49007

MARK BROOKS
Co-counsel for Defendant International
and Local 1010
PO Box 1475
Nashville, TN 37202
616-834-8590

QUESTIONS PRESENTED

1. WHETHER THE SIX-MONTH STATUTE OF LIMITATIONS OF §10(b) OF THE NATIONAL LABOR RELATIONS ACT, AS AMENDED, 29 U.S.C. §160(b) SHOULD RETROACTIVELY BAR APPELLANT SALISBURY'S HYBRID CAUSE OF ACTION FOR BREACH OF CONTRACT UNDER §301 OF THE NATIONAL LABOR MANAGEMENT RELATIONS ACT, 29. U.S.C.§185.

TABLE OF CONTENTS

Questions Presented	i
Index of Authorities	iii
Opinions Below	iv
Jurisdiction	iv
Statement	1
Reasons for Granting The Petition	5
Conclusion	13
Appendix I	15
Appendix II	34
Appendix III	36

INDEX OF AUTHORITIES

DelCostello v Teamsters,
462 US 1512 (1983) 1,4,5,6,8 9,10,11,12

Chevron Oil Co. v Huson,
404 U. S. 97 (1971) 6,7,9,10,11

Hanover Shoe Co. v United Shoe Machinery Corp.
392 U.S. 481 (1968) 6,12

International Union United Automobile, Aerospace and Agricultural Implement Workers of America v Hoosier Cardinal,
383 U. S. 696 (1966) 6,7,8,9

O. Edwards, Jr. v Teamsters Local Union No. 36, Building Material, Dump Truck Drivers,
719 F2d 1036 (9th Cir 1983) cert denied 104 S.Ct. 599 (1984) 5

Smith v General Motors Corp.,
747 F2d 371 (6th Cir. 1984) 4, 5

United Parcel Service, Inc. v Mitchell,
451 U. S. 51 (1981) 7,8,9,11

STATUTES:

29 U.S.C. §160(b) 1,3,9,11

29 U.S.C. §185 1,7

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

* * * * *

DONALD E. SALISBURY, Petitioner,

v.

JAMES RIVER CORPORATION,
UNITED PAPER WORKERS INTERNATIONAL,
AFL/CIO and LOCAL 1010 UNITED PAPER-
WORKERS,

* * * * *

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

* * * * *

Sloan, Benefiel, Farrer & Newton of counsel, and Randolph McCarthy, Jr., P.C., attorneys for Donald E. Salisbury, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (App. A., infra, 1-5) is not reported. The opinions of the District Court (App. B., infra, 6-10) are not reported.

JURISDICTION

The judgment of the Court of Appeals (App. A., infra 1-5) was entered on July 12, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On June 8, 1983 this Court decided the case of DelCostello v Teamsters, 462 US 1512 (1983). This Court established in that decision that when an employee brings suit against his employer and union under the Labor Management Relations Act of 1947, §301, 29 U.S.C. §185, the applicable statute of limitations is the six-month limitations period found in §10(b) of 29 U.S.C. §160(b), as amended.

2. On June 1, 1983, seven days prior to this Court's DelCostello decision, petitioner Donald Salisbury filed a third-party suit in the Ninth Judicial Circuit Court of the State of Michigan. The Petitioner's suit alleged that respondent James River Corporation, his employer, had wrongfully terminated his employment on August 28, 1982 and that

respondent unions, United Paperworkers Union Local 1010 and United Paperworkers International Union, AFL-CIO had unfairly represented him in the grievance procedure, all in violation of the collective bargaining agreement existing between the respondents in this case.

Petitioner Salisbury was fired by respondent employer for allegedly shooting a gun and destroying property at work in August of 1982. Petitioner Salisbury, however, had broken his right thumb during his employment on July 13, 1982 and was fired from employment while still on restricted work duty due to his broken thumb. Petitioner's employment was terminated in retaliation for sustaining a work related injury. Petitioner Salisbury timely filed a grievance of the termination of his employment with respondent local union.

Petitioner's request for arbitration of his grievance was denied by the local union membership on October 13, 1982. Petitioner Salisbury has never been advised in writing of the local union's decision not to pursue arbitration.

On July 6, 1983, the respondents removed this action to the U.S. District Court, Western District of Michigan. Respondents filed motions to dismiss asserting that the six-month statute of limitations provided for in §10(b) of the National Labor Relations Act. 29 U.S.C. §160(b) governed this action. The District Court dismissed Petitioner's claim against respondent Local 1010 and respondent International Union on January 12, 1984 finding that the six-month statute was applicable (App. B, 6-9) The District Court on April 23, 1984 dismissed Petitioner's claim for wrongful

discharge against respondent James River Corporation for the reasons expressed in its decision of January 12, 1984 (App. B 10).

On Appeal, the Sixth Circuit Court of Appeals affirmed. The Court recognized that in DelCostello v Teamsters, 462 U.S. 151 (1983) this Court established that the §10(b) statute of limitations was applicable to Federal causes of action brought in a hybrid §301 unfair representation case. The Court of Appeals concluded that pursuant to its decision in Smith v General Motors Corp., 747 F2d 372 (6th Cir. 1984) (en banc), the DelCostello decision was to be given retroactive application.

REASONS FOR GRANTING THE PETITION

This case presents an important question concerning the six-month statute of limitations established by this Court in DelCostello v Teamsters, 462 U.S. 151 (1983), that propounded a new principle of law and that if applied retroactively would result in substantial inequity. A disparity among circuits exists with respect to whether the six month statute of limitations contained in the NLRA should be applied retroactively to pending matters which first arose when the state statutes of limitation were applied by this Court in hybrid §301 claims. Compare O. Edwards, Jr. v Teamsters Local Union No. 36, Building Material, Dump Truck Drivers, 719 F2d 1036 (9th Cir 1983) cert denied 104 S.Ct. 599 (1984) and Smith v General Motors, supra. This disparity among circuits

requires review of this matter by this Court. The Sixth Circuit Court of Appeals has held that the six-month statute of limitations of DelCostello is to be applied retroactively. As a result, Petitioner's hybrid §301 claims are time barred.

This ruling by the Court of Appeals seriously misconstrues this Court's decisions in Hanover Shoe, Inc. v United Shoe Machinery Corp., 392 U.S. 481 (1968) and Chevron Oil Company v Huson, 404 U.S. 97 (1971) regarding the prospective application of a new principle of law. A new principal of law that establishes a "clear break" from past precedent should not be applied retroactively. Furthermore, this ruling fails to consider this Court's prior decisions in International Union United Automobile, Aerospace and Agricultural Implement Workers of

America, ALF-CIO v Hoosier Cardinal Corporation, 383 U.S. 696 (1966) and United Parcel Service, Inc. v Mitchell, 451 U.S. 51 (1981) where this Court in §301 claims borrowed state law statutes of limitation, pursuant to the general rule of this Court that State law is to be applied where the Federal statute is silent. In light of this Court's directive in Chevron that a "clear break" in law should not be applied retroactively, review of the decision below is essential.

1. a. In International Union United Automobile, Aerospace and Agricultural Implement Workers of America, AFL-CIO v Hoosier Cardinal Corporation, supra, this Court held that §301 of the National Labor Management Relations Act 29 U.S.C. §185 did not contain its own statute of limitations. The timeliness of a §301

suit, therefore, was to be determined, as a matter of federal law, by reference to the appropriate state statute of limitations. Subsequently, in United Parcel Service, Inc. v Mitchell, supra, another §301 suit, this Court reaffirmed the Hoosier decision that the timeliness of a §301 suit was to be determined by reference to state statutes of limitation, however, held that the applicable state statute was that for vacation of an arbitration award. In DelCostello this Court noted the general rule that where Federal law was silent as to the applicable statute, state law was to provide the statute of limitations. This Court, however, held that in some cases, to protect Federal interests, statutes of limitation should be drawn from related Federal statutes. This Court in DelCostello then adopted for a §301 hybrid

unfair representation claim the six-month statute of 29 U.S.C. §160.

Following the Hoosier and Mitchell decisions, DelCostello was an unprecedented break from the general rule that if Congress failed to specifically provide a statute of limitation, analogous state law was to be applied.

b. In the DelCostello decision this Court did not specifically decide whether the new rule was to be applied retroactively. To decide whether a new rule of law should be applied retroactively this Court has in the past applied the analysis developed in Chevron Oil Company v Huson, supra. In the Chevron case this Court stated that three factors must be balanced to decide retro-activity:

> "First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, see e.g. Hanover

> Shoe Inc. v United Shoe Machinery Corp., 392 U.S. 481 at 496 or by deciding an issue of first impression whose resolution was not clearly foreshadowed, see, e.g. Allen v State Board of Elections, supra, 393 U.S. at 572, 89 S.Ct. at 835. Second, it has been stressed that we must * * * weigh the merits and elements in each case by looking to the prior history of the rule in question, its purpose and effect and whether retrospective operation will further or retard its operation.' Linkletter v Walker, supra, 381 U.S. at 629, 85 S.Ct. at 1738. Finally, we have weighed the inequity imposed by retroactive application, for [W]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity. Cipriano v City of Houma, supra, 395 U.S. at 705, 89 S.Ct. at 1900."

In the Chevron case this Court refused to apply the new statute of limitations on a retroactive basis. As in the Chevron case the new statute of limitations established in DelCostello was a new principal of law which overrode

past precedent of Hoosier, supra and Mitchell, supra, and should not be applied retroactively. As in Chevron litigants relied on the previous statute of limitations. In DelCostello, this Court did not "discover" a new principle of law in espousing the new statute of limitations. This Court rejected the general rule that the analogous state statute was to be applied in favor of the statute found in §10(b) of 29 U.S.C. §160.

Secondly, although the question of which state statute to apply in a §301 claim was previously before this Court, it is evident that the lower courts in all of the circuits had decided on a case by case basis the applicable state statute until the DelCostello decision. DelCostello has achieved a uniform federal rule, however, only inequity

would be achieved by applying DelCostello retroactively.

Applying DelCostello retroactively can only result in inequity. In those cases where DelCostello lengthened the statute of limitations, the claimants could not have been relying on the Court's decision to protect their rights. These claimants would be neither helped nor harmed by a retroactive application of the new statute. In those cases, however, where DelCostello shortened the statute of limitations upon which the claimants had been relying, the claimants would be harmed by a retroactive application of the new statute. Therefore, a retroactive application of DelCostello would only harm the interests of claimants' previously protected by this Court.

As stated by this Court in Hanover Shoe, Inc. v United Shoe Machinery Corp.,

supra, if this Court abruptly changes a rule of law, the new rule will be applied prospectively only.

CONCLUSION

The petition for a writ of certiorari should be granted.

SLOAN, BEENFIEL, FARRER & NEWTON

By: _____
James A. Sloan
Attorneys for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the foregoing petition for certiorari upon all attorneys of record by depositing a copy of same in the United States mail, postage prepaid, addressed to them as follows:

Thomas D. Carey
130 N. Park Street
Kalamazoo, MI, 49007

Mark Brooks
PO Box 1475,
Nashville, TN, 37202

James E. Beck
900 ComericA Bldg.
Kalamazoo, MI, 49007

Randolph McCarthy, Jr.
201 Park Bldg.
132 W. South Street
Kalamazoo, MI 49007

This 4th day of November, 1985.

James T. Sloan

Nos. 84-115 & 84-1404

NORTHWEST INDUSTRIAL CREDIT UNION,

Plaintiff,

v.

DONALD SALISBURY,

Defendant and Third Party Plaintiff-Appellant,

JACK SALISBURY,

Third Party Plaintiff,

vs.

JAMES RIVER CORPORATION, UNITED PAPERWORKERS UNION LOCAL 1010, and UNITED PAPERWORKERS INTERNATIONAL UNION, AFL-CIO,

Third Party Defendants-Appellees.

_____/

ORDER

BEFORE: MARTIN and WELLFORD, Circuit Judges; and PECK, Senior Circuit Judge

The plaintiff appeals the orders dismissing his federal claims for wrongful discharge under §301 of the Labor Management Relations Act, 29 U.S.C.

§185, and the alleged breach of the Union's duty of fair representation and remanding pendent state claims to the state court from which this action was removed. Both appeals were referred to this panel pursuant to Rule 9(a), Rules of the Sixth Circuit. Upon examination of the record and briefs, this panel agrees unanimously that oral argument is not required. Rule 34(a), Federal Rules of Appellate Procedure.

The plaintiff was employed by the defendant Company until August, 1982 when he was discharged for the alleged intentional destruction of Company property. He filed a grievance which the Union processed through the initial stages of the grievance procedure. The Union's Bargaining Committee, however, decided not to pursue the grievance to arbitration. Pursuant to the Union's

by-laws, the plaintiff sought review of that decision by the Union membership. Plaintiff presented his arguments at a regular membership meeting held in October, 1982, but the membership voted not to take the grievance to arbitration.

In February, 1983, a credit union filed an action in state court to collect a loan made to the plaintiff. Asserting his discharge was the reason he could not repay the loan, the plaintiff filed the present third-party action against the Company and the Local and International Unions in state court on June 1, 1983. The third-party complaint included four causes of action. Count I asserted the Company wrongfully discharged the plaintiff in violation of the collective bargaining agreement. Count II asserted the Company's handling of the discharge amounted to the intentional infliction of

emotional harm upon the plaintiff and his father who also worked for the Company. Count III asserted the discharge was retaliatory in that the Company sought to avoid the payment of workmen's compensation to the plaintiff as the result of prior injury. Count IV asserted the Union breached its duty to represent the plaintiff fairly in the grievance procedure.

The Union removed the action to the district court and filed a motion to dismiss Count IV on grounds the complaint was untimely filed under the applicable six-month statute of limitations found in §10(b) of the National Labor Relations Act, 29 U.S.C. §160(b). The district court agreed and dismissed Count IV. The Company then moved for dismissal of Counts I and III on the same grounds and sought summary judgment as to Count II.

The district court then entered an order granting the motion to dismiss for the reasons stated in its prior order dismissing Count IV and remanding the pendent state law claims to the state court. These appeals followed.

As an initial matter, we find it necessary to interpret the scope of the district court's order disposing of Count I, II and III. The order, which is not a model of clarity, dismissed Count I as an untimely filed cause of action under §301. The reference therein to the prior order dismissing Count IV shows the Court relied upon the §10(b) statute of limitations in so doing. Because the order makes no reference to the possible preemption of the two remaining state law claims, we conclude the district court intended to remand both Counts II and III to the state court for further

proceedings. Neither party argues on appeal that such remand was an abuse of the district court's discretion.

In DelCostello v Teamsters, 462 U.S. 151 (1983), the Supreme Court held the §10(b) statute of limitations applicable to the federal causes of action in a hybrid §301/unfair representation case. In Smith v General Motors Corp., 747 F.2d 372 (6th Cir. 1984) (en banc), this Court held the DelCostello decision was to be given retroactive application. The district court therefore did not err in applying §10(b) to this case. The primary issue on appeal thus becomes when the statute began to run under the facts of this case. Under §10(b), a cause of action accrues "when the claimant discovers, or in the exercise of reasonable diligence should have discovered, the acts constituting the

alleged [violation]." NLRB v Allied Products Corp., 548 F.2d 644, 650 (6th Cir. 1977). For purposes of a hybrid §301/unfair representation action, that time is when the claimant knows or should have known of the unions' alleged breach of its duty of fair representation. See Howard v Lockheed-Georgia Co., 742 F.2d 612, 614 (11th Cir. 1984); Metz v Tootsie Roll Industries, Inc., 715 F.2d 299, 304 (7th Cir. 1983), cert. denied, ____ U.S. ___, 104 S.Ct. 976, 79 L.Ed. 214 (1984); Santos v District Council of New York City, 619 F.2d 963, 969 (2d Cir. 1980). Cf. Badon v General Motors Corp., 679 F.2d 93, 99-100 (6th Cir. 1982).

The district court found the plaintiff's cause of action accrued when the membership of the Union voted in October, 1982, not to take the plaintiff's grievance to arbitration.

The plaintiff argues the statue did not start to run at that time, however, because he did not receive written notice of the union's decision. He presented no evidence to show that such written notice was required under the by-laws of the Local Union or that he was unaware of the decision at the time it was made. The record makes clear the plaintiff was present at the membership meeting and was informed of the decision on the night it was made. Under these facts, we find the district court did not err in finding the statute of limtations started to run at that time. See Howard v Lockheed-Georgia Co., 742 F.2d at 614. See also, Metz v Tootsie Roll Industries, Inc., 715 F.2d at 304. The district court properly found, therefore, that the complaint filed on June 1, 1983 was untimely under §10(b).

The plaintiff further asserts the Company waived the defense based upon §10(b) because, unlike the union, it did not raise the defense of statute of limitations in its answer to the complaint. The rule in this Circuit is that the failure to include an affirmative defense in the answer does not waive that defense if the latter clearly appears on the face of the complaint and is later raised in a motion to dismiss. Pierce v County of Oakland, 652 F.2d 671 (6th Cir. 1981). We find the §10(b) defense did appear clearly upon the face of the plaintiff's compaint. Likewise, we find the plaintiff would not be prejudiced by permitting the Company to raise the defense in a motion to dismiss. The plaintiff was put on notice that such a defense existed by the Unions' prior

motion to dismiss filed shortly after the case was removed to federal court. Thus, the plaintiff did not forego other avenues of relief in reliance upon the Company's failure to raise the defense or suffer litigational expenses in the interval. The defense was properly permitted and granted. DelCostello v Teamsters, 588 F.Supp. 902, 906 (D. Md. 1984).

It is therefore ORDERED that the district court's orders dimissing Counts I and IV of the plaintiff's complaint and remanding Counts II and II(sic) to the state court be and hereby are affirmed. Rule 9(d)(3), Rules of the Sixth Circuit.

ENTERED BY ORDER OF THE COURT

/s/
Clerk

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

NORTHWEST INDUSTRIAL CREDIT UNION,

Plaintiff,

v DONALD SALISBURY, et al.,

Defendants.

_____/

File NO: K83-322 CA

ORDER

At a session of the Court held in and for said District and Division in the City of Grand Rapids, Michigan, this 23rd day of April, 1984.

PRESENT: HONORABLE BENJAMIN F. GIBSON, DISTRICT JUDGE

This case is before the Court pursuant to a motion to dismiss filed by the third party defendant. For the reasons expressed in this Court's Opinion dated January 12, 1984 the motion to dismiss is granted.

This case was removed to this Court

from Kalamazoo Circuit Court after the third party defendants were impleaded. The federal ground for removal was a §301 claim which is now dismissed. Therefore, pursuant to 28 U.S.C. §1447(c), this matter is remanded to the Kalamazoo Circuit Court in order for that Court to proceed on the state law claims.

IT IS SO ORDERED.

_____

BENJAMIN F. GIBSON
U.S. DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

NORTHWEST INDUSTRIAL CREDIT UNION,

Plaintiff,

v.

DONALD SALISBURY, et al.,

Defendants and Third Party Plaintiffs,

v.

JAMES RIVERS CORPORATION, et al.

Third Party Defendants

---/

File NO: K83-322 CA

MEMORANDUM & ORDER

At a session of the Court held in and for said District and Division in the City of Grand Rapids, Michigan, this 11th day of January, 1984.

PRESENT: HONORABLE BENJAMIN F. GIBSON, DISTRICT JUDGE

This case is before the Court pursuant to a motion to dismiss filed by

the defendant Labor Union. The labor union and the James River Corp. were impleaded by the defendant on the theory that they are liable to the plaintiff Credit Union for causing the defendant's inability to pay his debt. The defendant was discharged from employment by the James River Corp. on August 26, 1982. Defendant filed a written grievance with Local 1010 on August 28, 1982 which was pursued through the first three steps of the grievance procedure. Sometime in early October 1982 the Bargaining Committee of Local 1010 decided not to pursue defendant's grievance to arbitration.

The basis for defendant's claim against the Local is that it breached its duty of fair representation. With respect to the company defendant claims that it violated its collective bargaining agreement with the union when

it discharged defendant on August 26, 1982. Both claims are brought pursuant to the Labor Management Relations Act, §301, 29 U.,S. C.A. §185 (1947).

The Local's motion to dismiss asserts that the limitations period has run on defendant's fair representation claim. Defendant's third-party claim against the union was filed on June 1, 1983. The time when defendant knew or should have known of the union's alleged breach of its duty was, at the latest, early October, 1982. This is the period when the union decided not to pusue defendant's grievance to arbitration.[1]

The controlling case on the issue of limitations in §301 suits is Badon v General Motors Corp., 679 F.2d 93 (6th Cir. 1982) which was decided on May 25. The Badon decision made clear that in §301 actions the appropriate statute of

limitations is the six month statute provided for in §10(b). See also United Parcel Service v Mitchell, 451 U.S. 56 (1981). The six month period begins to run when the employee is barred from proceeding to the next step in the grievance procedure. Badon v General Motors Corp., 679 F.2d at 95. The defendant was informed that the union would not proceed to step 4 of the grievance procedure in September, 1982 by defendant's contention, or in early October, 1982 by the union's contention. In either case the six month period had run, as defendant filed his third-party §301 claim on June 1, 1983. Defendant's claim accrued after the Badon decision, and was filed more than six months after its accrual, therefore such claim must be dismissed as against the third-party defendant Union.

As defendant's §301 is the sole claim asserted against the union, said union is dismissed from this this case.

IT IS SO ORDERED.

BENJAMIN F. GIBSON
U.S. DISTRICT JUDGE

FOOTNOTE

[1] The Court notes that in Defendant's third party complaint he claims the meeting wherein the union made this decision occurred in September, 1982, and he admits that he was present at that meeting. The union claims the meeting occurred on October 5, 1982.